No. 83-1531

In The
Supreme Court of the United States
October Term, 1983

DONREY COMMUNICATIONS COMPANY, INC. d/b/a DONREY OUTDOOR ADVERTISING COMPANY,

Petitioner,

vs.

CITY OF FAYETTEVILLE, ARKANSAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether 23 U.S.C. §131(g) grants to billboard owners a private cause of action for just compensation upon forced removal of billboards pursuant to the amortization provision in a municipal ordinance?

(2) Whether the First Amendment to the United States Constitution prohibits a content neutral ordinance limiting the size and restricting the location of outdoor advertising signs, and whether the First Amendment requires an evidentiary finding that such an ordinance is reasonably related to the promotion of traffic safety and preservation of natural beauty?

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COUNTERSTATEMENT OF THE CASE

Donrey Communications Company, Inc. (Donrey) has for many years been engaged in the outdoor advertising

business in the City of Fayetteville, Arkansas. The company maintains sixty billboards on which space is rented for commercial advertising and for noncommercial messages. The advertising is for products and services not sold or offered on the land where the billboards are located. Donrey's billboards consist of "standard poster panels" which are 12' X 25' (300 square feet) and "painted bulletins" which are 12' X 48' (672 square feet). Most of Donrey's billboards are located on property zoned C-2, thoroughfare commercial district; a few are located on property zoned C-3, central business district, or I-1, light industrial and heavy commercial district. Many of Donrey's billboards are located within 660 feet of interstate or federal-aid primary highways. Donrey's billboards were erected from 12 to 24 years ago at a cost per sign of from $500 to $1,000. When originally installed, the billboards complied with all applicable city ordinances.

On June 29, 1970, the Fayetteville Board of Directors adopted a comprehensive zoning ordinance (Ordinance No. 1747) which limits the location of outdoor advertising signs (billboards) to property zoned C-2. On December 19, 1972, the Board adopted a comprehensive sign ordinance (Ordinance No. 1893) which restricts the size of both on-site and off-site freestanding signs to a maximum of 75 square feet and requires that such signs be set back a minimum distance from street right-of-way. Donrey's billboards do not conform to the size restrictions or setback requirements.

The sign ordinance provides that off-site, nonconforming signs be removed, or be altered to conform, by January 19, 1977 (four years from the effective date of the

ordinance). The zoning ordinance requires that nonconforming outdoor advertising signs be removed by the same date. Donrey challenged the constitutionality of the City's billboard regulations and amoritization requirement by filing a petition for declaratory judgment in Washington County Chancery Court.

Donrey's amended petition alleged, inter alia, that the City's restrictions on the size and location of billboards violates the First Amendment to the United States Constitution and alleged that the City's amortization requirement violates the Federal Highway Beautification Act (23 U.S.C. §131 et seq.) and the Arkansas Highway Beautification Act (Ark. Stat. Ann. §76-2501 et seq.). Donrey further alleged that the City's billboard restrictions are unrelated to any significant interest in the public health, safety, and welfare.

The case was submitted to the Chancery Court on stipulated facts and cross motions for summary judgment with supporting affidavits. The chancellor found that there was no genuine issue of material fact and upheld the constitutionality of the City's billboard restrictions and amortization requirement, as applied to Donrey. On appeal, the Arkansas Supreme Court affirmed. The Supreme Court found no First Amendment violation because the ordinances are content neutral and merely restrict the size, height, and location of billboards. The Court also found that the City's ordinances further the substantial governmental goals of traffic safety and aesthetics. Finally, the Court ruled that Donrey was not entitled to compensation under the Arkansas Highway Beautification Act because the City's ordinances had already mandated that

Donrey's signs be altered or removed before the Act was amended in 1981 to require payment of compensation upon forced removal. The Arkansas Supreme Court did not address the question of whether Donrey is entitled to compensation under 23 U.S.C. §131(g).

Following denial of its petition for rehearing by the Arkansas Supreme Court, Donrey filed in the Supreme Court of the United States a timely petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. The Arkansas Supreme Court did not decide a federal question, but merely construed Ark. Stat. Ann. §76-2508 as applied to the facts of this case. 23 U.S.C. §131(g) does not grant billboard owners a private cause of action to bring suit for payment under the Federal Highway Beautification Act.

2. The validity of a state statute is not in question, and the Arkansas Supreme Court's interpretation of Ark. Stat. Ann. §76-2508 is not repugnant to 23 U.S.C. §131(g). The federal statute does not preclude forced removal of billboards through amortization. The scheme of the Federal Highway Beautification Act is to grant the states an election, not to mandate payment.

3. The decision of the Arkansas Supreme Court does not conflict with a decision of the California Supreme Court as to the proper interpretation of 23 U.S.C. §131(g). The Arkansas court only interpreted Ark. Stat. Ann. §76-2508.

4. The First Amendment questions raised by petitioner have previously been decided by the United States Supreme Court. A content neutral ordinance limiting the size and restricting the location of outdoor advertising signs does not violate the First Amendment. As a matter of law, such an ordinance is reasonably related to the promotion of traffic safety and preservation of natural beauty.

REASONS FOR DENYING THE WRIT

1. The Arkansas Supreme Court Did Not Decide A Federal Question; The Judgment Rests On An Independent And Adequate State Ground.

Petitioner requests the United States Supreme Court to issue a writ of certiorari and review the decision of the Arkansas Supreme Court on the question of whether 23 U.S.C. §131(g) requires payment of just compensation for the forced removal of petitioner's outdoor advertising signs. The federal question raised by petitioner was not decided by the Arkansas Supreme Court. The Court merely construed Ark. Stat. Ann. §76-2508 as applied to the facts of this case. (See Amended Opinion at A13-14 of petitioner's Appendix.)

In order for a state court case to be reviewed in the United States Supreme Court, it must appear from the record that a federal question was decided by the state court, or that the judgment rendered could not have been given without deciding the federal question. *First National Bank v. Estherville, Iowa*, 213 U.S. 341, 30 S.Ct.

152, 54 L.Ed. 223 (1910); *Harding v. Illinois*, 196 U.S. 78, 25 S.Ct. 176, 49 L.Ed. 394 (1904). The judgment of the Arkansas Supreme Court was rendered without deciding the asserted federal question, because Donrey cannot bring suit under 23 U.S.C. §131(g) for payment of compensation. See *National Advertising Co. v. City of Ashland, Oregon*, 678 F.2d 106 (9th Cir. 1982) where the Court of Appeals held:

> "It has been assumed by all the parties here, and apparently by the district court as well, that Congress granted a private right of action to National and those similarly situated to bring suit for payment under the Act. Under recent authority, e. g., *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), no such right of action can be implied. Since the Highway Beautification Act creates no federal rights in favor of billboard owners, it creates no private cause of action for their benefit. . . ." 678 F.2d at 108-109.

Since Donrey could not assert a cause of action under 23 U.S.C. § 131(g), the only issue before the Arkansas Supreme Court was whether Ark. Stat. Ann. § 76-2508 requires that Donrey be compensated.

The Arkansas Highway Beautification Act was adopted to conform with the Federal Highway Beautification Act.[1] Where a state statute is similar to corresponding

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[1] *Yarbrough v. Arkansas Highway Commission*, 260 Ark. 161, 539 S.W.2d 419 (1976); *Donrey Communications Company, Inc. v. City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900 (1983).

provisions of federal law a federal question is presented only if the state court felt compelled by federal law to rule in the manner it did. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed. 2d 965 (1977); *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1975); *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 85 S. Ct. 871, 13 L.Ed.2d 753 (1965). If the state court did not feel constrained by federal law to rule as it did, an independent state ground of decision exists, and there is no federal jurisdiction to review the judgment. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439 (1965).

The Arkansas Supreme Court was not compelled by federal law to rule as it did. The Court merely refused to give retroactive application to a 1981 amendment to the Arkansas Highway Beautification Act. A writ of certiorari should not be granted where, as here, the judgment below rests on an independent and adequate state ground. *Wilson v. Loew's Inc.*, 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519 (1958).

The presumption of jurisdiction announced in *Michigan v. Long*, — U.S. —, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) is not applicable here, because the state court decision does not fairly appear to rest primarily on federal law, or to be interwoven with the federal law. It is clear from the opinion itself that the state court relied upon an adequate and independent state ground. The Supreme Court will not undertake to review such a decision. *Id.* The petition for writ of certiorari should be denied for lack of jurisdiction.

2. The Validity Of A State Statute Is Not In Question; And, The Arkansas Supreme Court's Interpretation Of Ark. Stat. Ann. § 76-2508 Is Not Repugnant To 23 U.S.C. § 131(g).

28 U.S.C. § 1257(3) provides that final judgments rendered by the highest court of a State may be reviewed by the Supreme Court where the validity of a State statute is drawn in question on the ground of its being repugnant to the laws of the United States. Here, the validity of a State statute has not been drawn in question.

Donrey contends that the Arkansas Supreme Court erred by not holding that 23 U.S.C. § 131(g) now precludes forced removal of billboards through amortization. There was no error. The scheme of the Federal Highway Beautification Act is to grant the states an election, not to mandate payment. The courts have consistently relied on this element of choice in upholding 23 U.S.C. § 131 against constitutional attack and in interpreting it. If a state chooses to use its police power to remove billboards and not pay compensation, at the risk of losing a portion of its federal highway funds, a private plaintiff cannot veto the state's choice. See *National Advertising Co. v. City of Ashland, Oregon*, supra, 678 F.2d at 108-109; *Suffolk Outdoor Advertising v. Southampton*, 455 N.E.2d 1245, 1247 (N.Y. 1983).

The petition for a writ of certiorari should be denied for lack of jurisdiction. The validity of a State statute is not in question; and, the Arkansas Supreme Court's interpretation of Ark. Stat. Ann. § 76-2508 is not repugnant to 23 U.S.C. § 131(g).

3. The Decision Of The Arkansas Supreme Court Does Not Conflict With A Decision By The California Supreme Court.

Petitioner argues that the decision of the Arkansas Supreme Court conflicts with a decision by the California Supreme Court[1] as to the proper interpretation of 23 U.S.C. § 131(g). There is no conflict. The Arkansas court did not interpret 23 U.S.C. § 131(g). It merely interpreted Ark. Stat. Ann. § 76-2508 as applied to the facts of this case. (See Amended Opinion at A13-14 of petitioner's Appendix.)

4. The First Amendment Questions Raised By Petitioner Have Previously Been Decided By The United States Supreme Court; The Arkansas Supreme Court Reached The Right Result.

Petitioner seeks a writ of certiorari to have this Court determine whether the First Amendment (1) prohibits a content neutral ordinance limiting the size and restricting the location of outdoor advertising signs, and (2) requires an evidentiary finding that such an ordinance is reasonably related to the promotion of traffic safety and preservation of natural beauty. Both questions were recently decided. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 90, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), a majority of the Court held as a matter of law that an ordinance which eliminates billboards reasonably relates to traffic safety and aesthetics. The plurality opinion reads as follows:

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[1] *Metromedia, Inc. v. City of San Diego*, 610 P.2d 409 (Cal. 1980), rev'd on other grounds, 453 U.S. 490, 101 S.Ct. 1817, 69 L.Ed.2d 800 (1981).

"... Does the ordinance 'directly advance' governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety. The California Supreme Court noted the meager record on this point but held 'as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.' ... Noting that 'billboards are intended to, and undoubtedly do, divert a driver's attention from the roadway,' ... and that whether the 'distracting effect contributes to traffic accidents invokes a continuing controversy,' ... the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable....

We reach a similar result with respect to the second asserted justification for the ordinance—advancement of the city's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.' ..." 453 U.S. at 508-510, 101 S.Ct. at 2892-2894.[1]

Here, the City of Fayetteville adduced evidence that its billboard regulations are reasonably related to both promoting traffic safety and preserving natural beauty. (The evidence consisted of affidavits by a traffic expert

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[1]The three dissenting Justices in *Metromedia, Inc.* likewise concluded that, as a matter of law, an ordinance which eliminates billboards reasonably relates to the legitimate governmental goal of preserving scenic beauty. 453 U.S. at 552, 560, 570; 101 S.Ct. at 2915, 2919-2920, 2924.

and a land use planning expert. T. 414-415; 691-692.) Under Arkansas law, aesthetic considerations alone justify restrictions on the size and location of signs. *City of Fayetteville v. McIlroy Bank & Trust*, 278 Ark. 500, 647 S.W. 2d 439, 440 (1983). There is no claim in this case that the City has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself. See *Metromedia, Inc. v. City of San Diego*, supra, 453 U.S. at 510, 101 S.Ct. at 2874.

Numerous courts have rejected Donrey's argument that it is unreasonable to prohibit outdoor advertising signs in commercial and industrial areas.[4] Wherever located, billboards by their very nature can be perceived as an aesthetic harm. *Metromedia, Inc. v. City of San Diego*, supra, 453 U.S. at 510; 101 S.Ct. at 2893-2894.

The Fayetteville sign ordinance and zoning ordinance do not afford a greater degree of protection to commercial speech than to non-commercial speech. They make no attempt to regulate content, but merely restrict the size and location of billboards. Under *Metromedia, Inc. v. City of San Diego*, supra, it is clear that the ordinances do not violate the First Amendment.

There is no merit to Donrey's argument that billboard restrictions which effectively eliminate the "standard" outdoor advertising business are unconstitutional. The

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[4]See *E. B. Elliot Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970); *John E. Donnelly & Sons, Inc. v. Outdoor Advertising Board*, 339 N.E.2d 709 (Mass. 1975); *John E. Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980); *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407, 414 (Cal. 1980), rev. on other grounds, 453 U.S. 490, 101 S.Ct. 1817, 69 L.Ed. 2d 800 (1981); *Cromwell v. Ferrier*, 225 N.E.2d 479 (N.Y. 1967).

same argument was rejected in *Metromedia, Inc. v. City of San Diego*, supra, where the Supreme Court expressly held that "off-site commercial billboards may be prohibited while on-site commercial billboards are permitted." 453 U.S. at 512; 101 S.Ct. at 2895.[5]

The petition for a writ of certiorari should be denied because this Court has previously decided the First Amendment questions raised by petitioner, and the Arkansas Supreme Court reached the right result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] In *Metromedia, Inc. v. City of San Diego*, supra, the parties had stipulated that enforcement of the ordinance would "eliminate the outdoor advertising business in the City of San Diego," and Metromedia, Inc. had argued that "the city's threatened destruction of the outdoor advertising business was prohibited by the Due Process Clause of the Fourteenth Amendment." 453 U.S. at 497, 101 S.Ct. at 2887.